IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' OPPOSITION TO "DEFENDANT B&H'S MOTION TO SEVER COUNTS" (DOCKET # 47)

I. Introduction

Defendant B&H Maintenance & Construction, Inc., has moved under Federal Rule of Criminal Procedure 14(a) to sever Count I from Count II because B&H is not charged in Count II. (Def. B&H's Mot. to Sev. Counts (Docket # 47).) Because B&H has not met its high burden to demonstrate clear prejudice, the motion should be denied.

II. Facts

The Defendants are charged in a two-count Indictment. Count I charges Landon Martin, Jon Paul Smith, and B&H Maintenance and Construction, Inc., with conspiring to rig bids in violation of 15 U.S.C. § 1. (Indictment Count I.) Count II charges Defendant Smith alone with obstructing

the investigation into Count I by tampering with a witness. (Indictment Count II.)

The conspiracy in Count I initially involved Defendant Smith, who was vice president of B&H Maintenance and Construction, Inc., and Kenneth Rains, an executive at a company called Flint Energy Services, Inc.[1] Smith and Rains conspired to rig bids for pipelines projects their companies were submitting to BP America Production Company ("BP America"). *(See* Indictment ¶ 3(d).) Because their two companies were the only competitors for certain BP America projects, Defendant Smith and Rains agreed to divide the work so that B&H would win some bids and Flint would win the others. (Indictment ¶ 3(c).) B&H would provide Rains with the prices it was bidding, and Rains agreed to bid higher than B&H on certain projects and lower on others. Defendant Martin, who was also an employee of B&H, was aware of the conspiracy and joined it no later than September 23, 2005, when he provided B&H's bid numbers to Kenneth Rains at Defendant Smith's request. Sometime in December of 2005, the conspiracy ended (although Defendant Smith did not know it), after a Flint employee reported the illegal activity to Flint executives. Both Rains and Flint have pled guilty to the conspiracy.

Count II charges Defendant Jon Paul Smith alone with obstructing the investigation into Count I by attempting to persuade Kenneth Rains to lie to the grand jury and the FBI about the conspiracy. (Indictment ¶ 19, 20.) After the United States learned of the bid rigging conspiracy, investigators from the FBI and Department of Justice visited Defendant Smith at his home to question him about the conspiracy. At the interview, Defendant Smith denied rigging bids and

[1]Defendant B&H participated in the conspiracy through the acts of its employee agents, Defendant Smith and Defendant Martin.

indicated that he did not know Rains well. At the close of the interview, he was served with a grand jury subpoena. Shortly after the government investigators left his house, Defendant Smith telephoned Kenneth Rains to coordinate their stories so that Rains would tell the same lies to the FBI and grand jury. Defendant Smith relayed to Rains the false statements he had made to the FBI and indicated that the government would never be able to prove the conspiracy. Both Smith and Rains knew that Smith's story was false and Rains understood that Smith was attempting to persuade him to tell the same lies.

III. Argument

Severance under Rule 14 "is justified only in the most extreme cases." *United States v. Rogers*, 921 F.2d 975, 984 (10th Cir. 1990); *accord United States v. Olmedo-Cruz*, 197 F.R.D. 498, 501 (D. Utah 2000). Severance is appropriate "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence," *Zafiro v. United States*, 506 U.S. 534, 539 (1993), and the defendant has the burden of showing this prejudice, *United States v. Troutman*, 814 F.2d 1428, 1447 (10th Cir. 1987); *United States v. Martinez*, 76 F.3d 1145, 1152 (10th Cir. 1996) ("defendant seeking severance carries the burden of establishing clear prejudice"). Moreover, if the defendant is able to show prejudice, it must also show that "less drastic measures, such as limiting instructions" will not cure the prejudice. *See Zafiro*, 506 U.S. at 539.

B&H has not met this demanding standard. In attempting to meet its burden, B&H has made only a conclusory allegation of prejudice, stating summarily that "[t]here can be no doubt that the government's presentation of evidence in an attempt to prove the witness tampering count

against Smith would 'appear[] to prejudice' B&H at trial.'" (Def. B&H's Mot. to Sev. Counts ¶ 5.) This conclusory allegation is insufficient because "[m]erely asserting a heightened chance of acquittal or the negative spillover effect of evidence against a codefendant is insufficient to warrant severance." *See United States v. Martinez*, 76 F.3d 1145, 1152 (10th Cir. 1996) (internal citation omitted); *accord United States v. Cardall*, 885 F.2d 656, 668 (10th Cir. 1989). Moreover, B&H has failed to indicate why less drastic measures – including limiting instructions – would not cure any prejudice it faces. *See Zafiro*, 506 U.S. at 539. As a result, B&H has failed to show that a "specific trial right" would be compromised, *Zafiro*, 506 U.S. at 39, and the motion must be denied.

IV. Conclusion

Accordingly, B&H's Motion to Sever Counts (Docket # 47) should be DENIED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing United States' Opposition to Defendant B&H's Motion to Sever Counts with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non

CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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